No. 83-2076

In the Supreme Court of the United States

October Term, 1983

ROGER POLLARD,
Petitioner,

vs.

BOARD OF POLICE COMMISSIONERS AND
NORMAN A. CARON,
Respondents.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

REPLY BRIEF OF PETITIONER

PADEN, WELCH, MARTIN, ALBANO
& GRAEFF, P.C.
MICHAEL W. MANNERS
Counsel of Record
C. ROBERT BUCKLEY
Law Building - 311 West Kansas
Independence, Missouri 64050
(816) 836-8000
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

No. 83-2076

In the Supreme Court of the United States

October Term, 1983

ROGER POLLARD,
Petitioner,

vs.

BOARD OF POLICE COMMISSIONERS AND
NORMAN A. CARON,
Respondents.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

REPLY BRIEF OF PETITIONER

REASONS FOR GRANTING THE WRIT

I. R.S.Mo. § 84.830 (1978) Impermissibly Infringes on Petitioner's Rights Under the First Amendment.

In Respondents' Brief in Opposition to Petition for Writ of Certiorari they argue that the public interest in eliminating corruption outweighs Petitioner's interests in freedom of speech and association.

Respondents are guilty of the same sort of faulty analysis eschewed by this Court in *United States v. Robel*, 389 U.S. 258 (1967). In that case the government argued that its interest in the national security should be balanced against Robel's interest in freedom of association. In response to that proposed analytical framework Chief Justice Warren noted as follows:

> It has been suggested that this case should be decided by "balancing" the governmental interests expressed in § 5(a)(1)(D) [of the Subversive Activities Control Act] against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. *Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal.* In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.

389 U.S., at 268 n.20.

The same thing is true at bar. The essential issue in this case is *not* whether Missouri has a more important interest in preventing police politicization than has Petitioner in exercising his First Amendment rights. Rather, the issue is whether Missouri has adopted a constitutional means in achieving its concededly legitimate legislative goal. Significantly, Respondents make no attempt in their Brief to meet their burden to show that Missouri's interests could not be met by restrictions that are less intrusive on Petitioner's First Amendment rights, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 (1981).

Respondents claim that this Court has previously decided that voluntary political contributions by governmental employees may be prohibited, citing *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1946); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). This argument is simply wrong. The statutes involved in those cases did not prohibit voluntary contributions. Indeed, the regulations promulgated under the Hatch Act (the subject of *Mitchell* and *Letter Carriers*) expressly permit such contributions, 413 U.S., at 576 n.21.

Finally, Respondents emphasize that this contribution was a "public, partisan, political contribution," Respondents' Brief at 10, emphasizing that the fact of the contribution was published in the Kansas City *Star*. Respondents imply that Petitioner was attempting to gain publicity by making his "public" contribution.

The Kansas City *Star* article to which Respondents refer published the names of *all* contributors to candidates running for the Fifth District nomination. This article

listed the names of 364 contributors in very small print. Petitioner's name was not singled out for special attention, nor did Petitioner seek such attention. The only reason that the fact of this contribution ever became public knowledge was because the names of all contributors are a matter of public record under Missouri law, R.S.Mo. § 130.086 (1978), a circumstance beyond Petitioner's control.

One other thing should be noted about Petitioner's First Amendment argument. Respondents rely on the case of *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543 (8th Cir. 1984), in their Brief. The Eighth Circuit's opinion is quite similar to that of the Missouri Supreme Court. The Eighth Circuit does raise one new point that should be addressed, however.

The Eighth Circuit cited this Court's Opinion in *Kelley v. Johnson*, 425 U.S. 238 (1976), for the proposition that this Court impliedly gave its imprimatur to a ban on voluntary political contributions by police officers, 733 F.2d, at 548.

The simple answer to the Eighth Circuit's reasoning is that *Kelley* is completely inapposite. *Kelley* involved a challenge to police hair length regulations. Those regulations were *not* challenged on First Amendment grounds, 425 U.S., at 251 n.3, nor was a First Amendment standard of review employed, *Division 241 Amalgamated Transit Union (AFL-CIO) v. Susey*, 538 F.2d 1264, 1266 (7th Cir. 1976). Hence, *Kelley* does not decide the case at bar.

Because the present case presents a profound limitation on fundamental rights never before directly addressed by this Court, certiorari should be granted.

II. R.S.Mo. § 84.830 (1978) Violates the Equal Protection Clause of the Fourteenth Amendment.

Respondents claim that under *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), Missouri may deny *Kansas City* police officers the right to make voluntary political contributions while not denying such rights to other police officers in the State. *Broadrick* holds no such thing.

Plaintiffs in *Broadrick* were classified employees of the State of Oklahoma. They argued that Oklahoma law restricting their rights to engage in partisan political activities violated the equal protection clause of the Fourteenth Amendment because the law imposed no such restrictions on unclassified employees. There was no indication that these two classes of employees occupied similar positions.

In contrast § 84.830 singles out certain members of a particular class—*viz.* Kansas City police offcers—and denies them rights afforded to other members of the same class—i.e. all other police officers in the State of Missouri. Respondents provide absolutely no rationale for limiting the effect of § 84.830 to Kansas City police officers.

Section 84.830 presents a classic example of a statutory classification that burdens the exercise of fundamental rights by a particular group—Kansas City police officers. In order to satisfy the Fourteenth Amendment, the discriminatory treatment of Kansas City police officers must be necessary to achieve a compelling State interest, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 34 n.73 (1973). It is of overwhelming significance that Respondents make no attempt to demonstrate why Kansas City police officers should be denied rights that are not denied to, say, St. Louis police officers.

Respondents' inability to offer any cogent reasons to support the discriminatory treatment of § 84.830 warrants the grant of certiorari.

III. Application of R.S.Mo. § 84.830 (1978) At Bar Is Preempted by the Federal Election Campaign Act, 2 U.S.C. § 453.

Respondents go on at length about the legislative history of the 1974 amendments to the Federal Election Campaign Act, claiming that Congress did not intend to preempt laws like § 84.830. Respondents rely on the same legislative history cited by the Missouri Supreme Court.

In his Petition for Writ of Certiorari Petitioner demonstrated that the legislative history set out by the Missouri Supreme Court was applicable to 5 U.S.C. § 1502 rather than 2 U.S.C. § 453. He argued that Congress' intent as to the preemptive effect of 2 U.S.C. § 453 could not be ascertained by looking to the legislative history of an entirely different section.

In their Brief Respondents simply ignore Petitioner's argument. Respondents never explain how the intent of Congress in enacting an amendment to 5 U.S.C. § 1502 has anything to do with its intent in enacting 2 U.S.C. § 453.[1]

The preemptive effect of 2 U.S.C. § 453 on the power of the States to restrict contributions to candidates for federal office warrants the grant of certiorari.

---

1. It should be emphasized that the present case does not involve 5 U.S.C. § 1502. Petitioner is not a State or local employee whose position is funded by federal grant.

CONCLUSION

For the above reasons Petitioner would pray this Court to grant his Petition.

Respectfully submitted,

PADEN, WELCH, MARTIN, ALBANO
& GRAEFF, P.C.
MICHAEL W. MANNERS
Counsel of Record
C. ROBERT BUCKLEY
Law Building - 311 West Kansas
Independence, Missouri 64050
(816) 836-8000
Attorneys for Petitioner